

3

No. 2599

---

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

COAST SHIPPING COMPANY, a corporation,  
Claimant of the Schooner "Oceania Vance,"  
her Tackle, Apparel and Furniture,

Appellant,

vs.

PUGET SOUND TUG-BOAT COMPANY, a corporation,

Appellee.

---

Upon Appeal from the District Court of the United  
States for the Western District of Wash-  
ington, Northern Division.

---

**BRIEF FOR APPELLEE**

---

HUGHES, McMICKEN, DOVELL & RAMSEY,  
OTTO B. RUPP,

Proctors for Appellee.

---

Filed  
BOWMAN & HANFORD CO., SEATTLE

---

SEP - 2 1915

F. D. Monckton,



No. 2599

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

COAST SHIPPING COMPANY, a corporation,  
Claimant of the Schooner "Oceania Vance,"  
her Tackle, Apparel and Furniture,

Appellant,

vs.

PUGET SOUND TUG-BOAT COMPANY, a corporation,

Appellee.

---

Upon Appeal from the District Court of the United  
States for the Western District of Wash-  
ington, Northern Division.

---

**BRIEF FOR APPELLEE**

---

**STATEMENT.**

About 12:30 on the morning of June 9, 1909, the tug "Sea Lion," having in tow the barge "Charger," laden with rock, sailed from Cowlitz Bay on Waldron Island bound for Grays Harbor. The "Sea Lion" was of the length of 107 feet, beam 22 feet, depth of hold 13 feet. She was owned by

the Puget Sound Tug-Boat Company, and, with the fuel aboard and her equipment, was worth from \$30,000 to \$35,000. Just before starting she had taken on a full cargo of coal at Ladysmith, which, together with her water supply, made her deep in the water. She carried a full complement of officers and crew and was in all respects well equipped and appareled.

The barge had a carrying capacity of 1700 tons and was attached to the tug by a hawser approximately 1200 feet in length.

Captain Lovejoy, the master of the tug, was on watch when the "Sea Lion" left Cowlitz Bay and so remained until the tug arrived off Turn Point on Stuart Island, when he went to bed. At that time there was no fog, but off Discovery Island a fog came in and quickly grew thick, and so stayed until some hours after the collision. Thereupon the mate started to blow the whistle, a deep, coarse whistle, one long and two short, the prescribed signal for a vessel having a tow. This whistle was continuously sounded until the time of the collision, and no contention is made by appellant that such is not the proper signal nor that it was improperly given, both Captain Scott and First Officer Williams of the "Oceania Vance" saying that they heard it for ten or fifteen minutes before the collision.

After passing Discovery Island the "Sea Lion" shaped her course to pass Race Rocks, a collection of rocky islets just off the most southerly point of

Vancouver Island. The course of the "Sea Lion" was about southwest three quarters south, that being the usual course of steam vessels outward bound, which course, if the collision had not taken place, would have been maintained until she reached the place marked "A" on libelant's (appellee's) Exhibit "A," when the course would have been changed to pass outward to Flattery.

Just before 6:40 A. M. the men on board the tug heard the automatic hand horn of the "Oceania Vance." The "Oceania Vance" was then giving three blasts, indicating that she was a sailing vessel running before the wind. Captain Stream, the mate of the "Sea Lion," and then in charge, immediately gave the signal to stop the engines of the tug and at the same time blew his tow signal, such action being that required by statute. Thereupon the schooner blew three blasts of her whistle in response, but before the third blast was completely blown she loomed out of the fog, though those on board the tug were unable at that time to see the whole length of the ship or her exact course, but were able to ascertain that she was heading toward amidships of the "Sea Lion." The schooner was then distant about 175 or 200 feet.

On seeing the schooner, Captain Stream gave the signal to reverse the engines. By this time Capt. Lovejoy had reached the wheelhouse, his bunk being on a level with the wheelhouse and connected therewith by a door, Capt. Stream going aft to endeavor to prevent the hawser from fouling the propeller.

When Lovejoy reached the wheelhouse the tug had not entirely lost her headway, and, owing to the fact that the "Sea Lion" when backed had a habit of swinging around to port very abruptly, thus bringing her right in line with the way the schooner was coming and making a collision inevitable, Lovejoy, in an endeavor to avert the same, ordered full speed ahead, that being the only chance he then had. At the same time Lovejoy called to the lookout on the "Oceania Vance" to put the wheel of the schooner over, but no attempt to comply with this request was made by those in charge of the schooner.

A few seconds later the bow of the "Oceania Vance" struck the "Sea Lion" about twenty feet forward of the latter's stern, cutting a hole variously estimated from a foot and a half to three feet in width, while the headgear raked the aft end of the tug's house, taking out the mast, bell pulls, davits and boats.

The captain of the "Oceania Vance," being better able to ascertain the danger than those on board the tug, told the crew of the tug to hurry up and get off. The crew and officers of the "Sea Lion" accordingly climbed up the bobstays, just having time to get aboard the "Oceania Vance" when the schooner broke out and the "Sea Lion" sank in 72 fathoms. After speaking the barge, the "Oceania Vance" squared away for Port Townsend.

The foregoing statement does not include any controverted question of fact except that as to when the engines of the tug were stopped.

## ARGUMENT.

## I.

*The Speed of the "Oceania Vance" Was Excessive.*

The chief, if not the only question for solution in this case, is the speed at which the schooner was proceeding prior to and at the time of the collision.

(a) The trial judge found that "the schooner was going not less than six and one-half or seven knots an hour" (Rec. p. 162); and this finding is fully warranted by the testimony.

Capt. Lovejoy testified that at the time of the collision the wind was blowing fifteen or twenty miles an hour (Rec. pp. 35, 39) from the southwest (Rec. p. 97), that being a fair wind for a schooner inward bound.

Anderson, the quartermaster of the "Sea Lion," who had been a seaman for forty-one years, fourteen years of which period he had been master of sailing vessels (Rec. p. 104), characterized it as a "strong breeze" (Rec. pp. 100, 104, 109), so strong that it would have required two men to have pulled a boat against it (Rec. p. 110).

Williams, the first mate of the schooner, admitted that a fresh wind was blowing at the time of the collision (Rec. p. 127); while the master of the "Oceania Vance" admits that in order to take advantage of this fair, fresh breeze, the schooner at the time of the collision had up her courses, fore-sails, jib and spanker topsails (Rec. pp. 156, 157), all the sail, no doubt, she was capable of carrying in



such a breeze. Capt. Lovejoy says that all sails set were full and drawing (Rec. p. 37).

It is also indisputable, we think, that the schooner in order to make speed had been tacking back and forth from the time she passed in from Flattery, the evening before, down to the time of the collision. Capt. Lovejoy testified that both the captain and the mate of the schooner told him that such was the fact (Rec. pp. 42, 47), while Capt. Scott admitted he had changed his course, not only after passing Race Rocks, but also prior thereto; but how many times, he said he could not remember (Rec. p. 151).

Irrespective of whether the schooner had been tacking back and forth, it is clear that, under the prevailing conditions of wind and weather and taking into consideration that the schooner was light (Rec. p. 157), that she "always ran before the wind" (Rec. p. 151) and that she had all her lower and some of her topsails set, she was able to make seven or eight knots if those in charge of her were so inclined. Furthermore, the testimony abundantly shows both that such was the inclination of those in charge of her and that such was her speed.

Capt. Lovejoy states that some fifteen or twenty minutes after the schooner had shaped her course for Dungeness he took the log for the first half hour, and at that time she ran about three and one-half or seven knots an hour (Rec. pp. 41, 47, 54). His testimony is corroborated by that of Smith (Rec. pp. 63, 67). At this time the wind had moderated somewhat and was gradually dying out (Rec.



pp. 41, 51, 69). In fact, before Dungeness was reached the wind had abated so much that the schooner was not able to make a mile an hour (Rec. p. 41).

Now if the schooner after the collision, when the fog still prevailed, was sailed at a speed of seven knots an hour, is it not reasonable to believe that such was her speed shortly prior to the collision? If those in charge of the schooner were willing, after a catastrophe had occurred, to violate the statute which provides that "every vessel shall in a fog \* \* \* go at a moderate speed," there ought to be a presumption that they were at least equally willing to violate the statute *before* they had run down and sunk another ship.

Captain Scott himself, five days after the collision, gave the following testimony before the United States inspectors:

"Q. How do you conclude that you were only running five miles an hour?

A. By the distance between Cape Flattery and Race Rocks and the number of hours it took to run it.

Q. You were a witness before the Inspectors, were you not, after this collision?

A. I was.

Q. On or about June 14th, 1909. At that time you gave this testimony:

'Q. About what speed were you going?

A. I should judge by *figuring* from my log, the vessel was going between six and a half and seven knots.' Was that correct?

A. At that time I had not *figured* up my distance.

Q. You say here 'By *figuring* from my log the vessel was going between six and a half and seven knots.' You had the log at the time and evidently figured from it?

A. As I say, at that time I had not *figured* my distance. I did not have the *time* to *figure* the distance. I was too busy. I jumped up to the Inspectors and took the examination, or was there for the examination.

Q. The collision occurred on the *9th* and your examination did not take place until the *14th*, after the *14th* day of June, five days elapsed; do you mean to say that you did not have access to your log during the five days, to consider any of these matters?

A. I had access to my log at all times.

Q. Did you bring your log with you to the Inspectors' office?

A. The log was with me at the Inspectors' office.

Q. Right there with you in the Inspectors' office?

A. Yes sir.

Q. And when you answered this question, you figured from your log, didn't you?

A. I did not figure from anything. That was my own opinion at the time.

Q. You gave this answer to the question propounded:

'Q. About what speed were you making?' and you answered:

'A. I should judge by figuring from my log, the vessel was going between six and a half and seven knots.'

You gave that answer to that question?

A. I did, I gave that answer to the question."

(Rec. pp. 152 *et seq.*)

Appellant now seeks to meet this testimony by arguing that inasmuch as the distance from Flat-tory to the point of collision was fifty miles and that inasmuch as Scott testified that the schooner passed

Flattery at eight o'clock, the schooner could not be going at the time of the collision at a speed to exceed five knots an hour.

In the first place, it may be said that Capt. Scott himself, at the hearing before the United States Inspectors, admitted that he passed Flattery at nine o'clock.

“Q. You were also asked this question: ‘When did you pass the Cape?’ and you answered ‘Nine o'clock Wednesday night.’ Is that correct?

A. I do not remember what I answered.

Q. Well, I ask you to look at this transcript of your testimony, and tell me whether or not that question was propounded to you and you gave that answer?

A. Which part of it?

Q. I just read you that question there, and then this question here ‘What time did you pass the Cape?’ and your answer ‘Nine o'clock.’ You gave that testimony did you not?

A. I was always of the impression that it was eight o'clock.

Q. You gave that testimony?

A. I do not remember whether I did. I do not remember whether I gave it.

Q. I show you a copy of the testimony taken at that time and ask you if you are now disposed to dispute its correctness?

A. No, I am not disposed to dispute it, if that is a straight copy of what I said up there, it must be.”

(Rec. pp. 153, 154.)

Moreover, an examination of libelant's Exhibit “A” will demonstrate that it is almost exactly fifty miles from Flattery to the point of collision *in a straight line*; but certainly no sailing vessel could sail a course so straight. And in addition thereto,

we have the testimony of Scott himself that the vessel's course had been changed several times during the night.

As a matter of fact, the location in which the "Oceania Vance" was at the time of the collision will demonstrate beyond question that the "Oceania Vance" did not sail straight up the Sound.

Furthermore, this theory is based upon the supposition that the wind blew with the same velocity throughout the night, an assumption which the testimony does not disclose to be the fact.

On the same theory it might be argued that the speed of the schooner at any particular time on the course from the point of collision to Port Townsend was between four and five knots per hour. In fact, Capt. Scott based his testimony, at the time of trial, that the "Oceania Vance" was making five knots an hour at the time of the *collision*, partly on the time "it took her to run from *Race Rocks to Port Townsend* (Rec. p. 142)." Yet Williams, the mate of the "Oceania Vance," admitted that while traversing a portion of that course they were at times not making a mile an hour. It is a matter of mathematical demonstration, however, that in order to make forty miles in nine hours, they must have made more than five knots an hour at some periods, if during other periods they were making only one mile an hour.

Now not only was the schooner going at an immoderate speed through a dense fog, but she was also in a place where ships pass frequently, and it

was therefore her duty, irrespective of statute, to navigate with care and caution.

*The Rhode Island*, 17 Fed. 554, 558.

(b) Despite the elaborate argument made by appellant to show that the speed of the "Oceania Vance" did not exceed five knots an hour, it further contends that seven knots an hour was not excessive speed. The proximity of land and the existence of currents are assigned as reasons which *might* justify a speed of seven to eight knots.

This contention merits but little consideration. No witness testifies that it was necessary to go seven knots an hour in order to maintain steerage-way; the officers of the schooner make no such claim.

The case of *The Chattahoochee*, 173 U. S. 540, reviews all the cases and it will be found by an examination of these cases that a speed of seven knots an hour in a dense fog has never been held justifiable.

It is true that in *The Eagle Point*, 114 Fed. 971 (cited by appellant on page 17 of its brief), the district judge held that seven knots was not excessive speed for a steamer proceeding in a dense fog. On appeal, however, the decision of the lower court was reversed, the Court of Appeals basing its conclusion in part on the following quotation from *The Pennsylvania*, 19 Wall. 125:

"And we do not think the evidence shows any necessity for such a rate of speed as the steamer maintained. It is true, her master, while admitting she was going seven knots, states that he don't con-



sider she could have been steered going slower,—could not have been steered straight. And two other witnesses testify that, in their opinion, she could not have been navigated with safety and kept under command at a less rate of speed than seven miles an hour. These, however, are but expressions of opinions based upon no facts. They are of little worth. And even if it were true that such a rate was necessary for safe steerage, it would not justify driving the steamer through so dense a fog along a route so much frequented, and when the probability of encountering other vessels was so great. It would rather have been her duty to lay to.”

*The Eagle Point*, 120 Fed. 449, 453.

## II.

*The Schooner Was Negligent in Failing to Put Her Helm Hard Aport Prior to the Collision.*

Capt. Roos testified that putting the helm hard aport would have brought the schooner up into the wind and have stopped her headway and though there might have been a collision, the force of it would have been greatly diminished (Rec. p. 114). He points out also that whether the tug was backing or going ahead with her wheel hard astarboard, the result would be the same (Rec. p. 113). The testimony of Stream is practically the same (Rec. p. 87). Furthermore, the answer of the appellant admits that good seamanship required such action, for it alleges that “immediately” after the tug came in sight “the schooner endeavored to steer so as to get out of the way of the ‘Sea Lion’”—and “that when the said ‘Oceania Vance’ and its officers heard the whistle of the said tug ‘Sea Lion’ they did their

utmost to steer clear of anything coming near it and *had swung quite a little bit*, when the said 'Sea Lion' crashed into the said 'Oceania Vance'." (Rec. p. 26.) The record, however, is barren of any evidence tending to establish either of these allegations. Moreover, Scott himself admitted our contention when he said that if he had known the tug was going astern, he would have endeavored to put his helm hard aport and tried to get ahead of her (Rec. p. 146).

Appellant, however, seeks to avoid this fault by claiming that inasmuch as the tug did not blow three blasts of her whistle, the officers of the schooner did not know the "Sea Lion" was backing, and in the absence of such knowledge were not required to take the course suggested. As to this contention, we say, first, that in view of the testimony of Captains Roos, Stream and Lovejoy, it was the duty of the "Oceania Vance" to put her helm hard aport irrespective of whether the tug was going ahead with the wheel hard astarboard or was backing. In the second place, we think that the claim is clearly an afterthought. The answer does not assign the failure to give such a signal as a fault, while Scott, five days after the collision at the hearing before United States Inspectors, testified as follows:

"Q. At the time of the breaking through the fog up to the time of the collision, do you think there was time enough for either vessel to have been manoeuvred so as to clear?



A. I do not think anything in the world would have averted the collision."

From this testimony it is apparent that Scott would have kept straight on, even if the tug had notified him that her engines had been reversed. That this last statement is correct is evident from the following testimony of Williams, the mate of the schooner:

"Q. Was there anything that those in charge of the schooner could have done after you sighted the tug to avert the disaster?

A. Nothing whatever, we were too close to each other, *even if we had put the wheel the other way* she could not have answered in time.

Q. You were bound to come in contact?

A. We were bound to come in contact." (Rec. p. 132.)

Furthermore, the evidence is undisputed that Capt. Lovejoy requested the lookout on the schooner to put her wheel hard aport. Lovejoy says that he "motioned for him and *hollered* to him to put the wheel over." Appellant now tries to meet this testimony by saying that the evidence does not show that the signal of Lovejoy was *seen*, or, if seen, that it was understood. The significant thing, however, is that no witness on behalf of appellant denies that the motion was seen *or the call heard*.

On the whole, then, it clearly appears that proper seamanship required the schooner to take the action requested; that she did not do so; that her failure to do so was not attributable to the fact that the tug omitted to blow her whistle, but solely to the be-

lief of the schooner's officers that nothing could be done to avert the collision.

In view of all the testimony, therefore, the schooner violated Article 21 of the International Rules, which, as amended, reads as follows:

“Article 21. Where, by any of these rules, one of two vessels is to keep out of the way the other shall keep her course and speed.

Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision can not be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision. (See articles twenty-seven and twenty-nine.) [28 Stat. L. 83.]”

It may be true that changing the course of the “Oceania Vance” would not have entirely averted the collision; but it would at least have lightened the blow. In all likelihood the vessels would simply have bumped together and the damage, if any, would have been slight.

### III.

#### *The Tug's Engines Were Stopped Upon Hearing the First Signal of the Schooner.*

It is claimed, however, that the tug's engines were not stopped as soon as those in charge of her heard the first signal of the schooner. This claim is based upon the following testimony of Captain Lovejoy:

“Q. When you first heard the signal of the ‘Oceania Vance’ what did you do?

A. Why, the mate spoke to me. He said there was a sailing vessel. The ‘Oceania Vance’ blew three whistles on a hand horn, and three whistles

indicate that the vessel has the wind abaft the beam, and also three whistles, a long and two short whistles, is a signal allowed by a barge or sailing vessel being towed by a tug, they can make that to show us that they are being towed. I heard the whistle so plainly, and the mate said there was a vessel ahead on the starboard bow, and I said, 'Are you sure it is not the barge starting to blow?' and he said, 'No, I am quite certain it is ahead; it sounded quite loud,' and he answered the whistle right away, and almost immediately she blew another whistle, and then I was satisfied she was right ahead on the starboard bow, *and I got into the pilot-house and the mate stopped her and started to back;* and when I got into the pilot-house the bow of the vessel was coming out of the fog ahead and heading directly for us" (Record, pp. 35, 36.)

Now, in the first place, it will be observed that Capt. Lovejoy was not attempting to narrate events in the strict order in which they happened. While he says that "I got into the pilot-house and the mate stopped her and started to back," yet it is clear from other testimony of Capt. Lovejoy, corroborated by that of the mate, that the mate had stopped the boat and that the engines were reversed before Lovejoy reached the pilot-house. He says: "Well, when I got in the pilot-house and he said she was backing I looked over the side and she still had her headway on her going through the water, although the engines were reversed" (Rec. p. 37). The mate himself stated:

"Q. When you first heard this fog horn from the schooner what did you do?

A. I stopped and blowed my whistle and *told Captain Lovejoy.*" (Rec. p. 81.)

Now what did Stream tell Lovejoy? Precisely what Lovejoy stated, namely, "There is a sailing vessel ahead on the starboard bow." Lovejoy was doubtful if such was the fact, for the reasons given by him, and therefore he replied, "Are you sure it is not the barge starting to blow?" Stream, however, having no doubt about the latter, answered, "No, I am quite certain it is ahead; it sounded quite loud." Now if the mate was so certain that it was a sailing vessel, is it not reasonable to believe that he did stop as soon as he heard the first signal? He ought to know just when the order to stop was given.

Moreover, the mate's testimony is corroborated by Chief Engineer Smith. Smith testified that just before the collision he was asleep; that he was awakened by hearing the stop bell in the engine room (Rec. p. 64); that as he got up he heard the regular tow whistle (Rec. p. 60). Now Stream says that he stopped and blew his whistle. The stop bell must have rung, therefore, immediately before the tow whistle was given. But if the construction which appellant puts on Lovejoy's testimony is correct, the stop bell would have been given some seconds—at least long enough for the conversation above detailed to have taken place—*after* Smith got up and not before.

## IV AND V.

*The Tug Was Not Negligent in Failing to Give a Signal that She Was Going Astern nor in First Reversing Her Engine and then Going Ahead.*

It is contended that the tug was negligent in failing to give a signal that she was going astern and in first reversing her engines and then going ahead. We think we have shown that the fact that the tug did not blow three blasts of her whistle had nothing to do with the neglect of the schooner to put over her wheel. In addition to that, the testimony discloses that it would have been impracticable for the tug to have given such signal.

Stream testified that when he first saw the schooner he backed the tug and at the same time blew the danger signal.

“Q. Did you give the danger signal before you gave the signal to the engine room to back?

A. No sir, they were all done together. I had the left hand on the whistle cord and the right hand on the bell.” (Rec. p. 83.)

While Stream was giving these signals Lovejoy came into the pilot house (Rec. p. 83) and immediately ordered full speed ahead (Rec. pp. 37, 94). Stream, therefore, did not have time to give any such signal, and Lovejoy had no reason so to do.

Neither was there any negligence in first backing the tug and then going ahead. When Stream first saw the schooner he could not make out her course



except that she was apparently heading about amidships of the tug (Rec. p. 82). Believing that the schooner would swing up into the wind and that by backing the tug only a glancing blow would be struck, he gave the order to reverse (Rec. p. 87). The schooner, however, not changing her course, and Lovejoy, knowing that the tug when backed had a habit of swinging around to port very abruptly and that if the backing was continued the hawser might become entangled in the wheel, thus rendering the tug helpless, "decided that full speed ahead was the best course for all concerned" (Rec. p. 55).

Now whether this action was wise or not is immaterial. It was clearly an act *in extremis*, and was therefore not imputable as a fault.

*The Ship Blue Jacket v. Tacoma Mill Co.*,  
144 U. S. 371.

*The Ludvig Holberg*, 157 U. S. 60, 70.

*The F. W. Wheeler*, 78 Fed. 824, 832.

*The E. A. Packer*, 49 Fed. 92, 98.

*The Ella B.*, 19 Fed. 792.

*The Osceola*, 33 Fed. 719.

Moreover, it ill becomes appellant to claim that the tug was at fault in endeavoring to avert the collision, when the officers of the schooner did not endeavor to prevent or mitigate the disaster. One thing at least is certain: If the "Oceania Vance" had not been proceeding at an immoderate rate of speed, no collision would have occurred. And we

submit, therefore, that she alone was at fault, and the judgment should be affirmed.

Respectfully submitted,

HUGHES, McMICKEN, DOVELL & RAMSEY,  
OTTO B. RUPP,

*Proctors for Appellee.*